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INTELLECTUAL PROPERTY AFTER THE EU REFERENDUM

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Abstract

The Government is deciding how and when to trigger Article 50 of the Treaty on the Functioning of the European Union. In the meantime, some “remainers” are pointing out the allegedly tragic consequences of Brexit, whereas a more cautious approach would be wise. There is much uncertainty on the future of intellectual property (IP) in the UK after the referendum and one could foresee that there will be more cons than pros. However, some opportunities may as well arise. **This poster aims to assess the impact of Brexit on IP by distinguishing between areas that do not need significant intervention, areas where no real intervention will be allowed and areas where there is need for an update.** In the near future, the Government and the Parliament will be likely focused on the negotiations with the European Union and there is the risk that IP issues will be overlooked. Therefore, it will be up to the judiciary to modernise intellectual property and ensure that the UK does not depart radically from the IP systems of the Member States. Thus, by ensuring a substantial, albeit not full, harmonisation of the relevant rules, fragmented IP regimes will not constitute trade barriers and the UK will retain its appeal as a thriving marketplace for investors. In order to do so, some “IP regimes shopping” will be useful, although this will mean a partial departure from the EU rules. A takeaway is that since English judges will not be entitled to preliminary references to the Court of Justice, they will become eventually European judges.

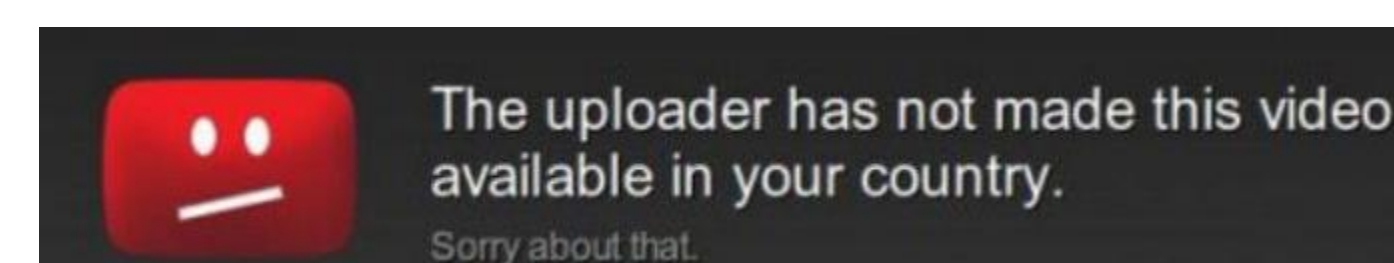
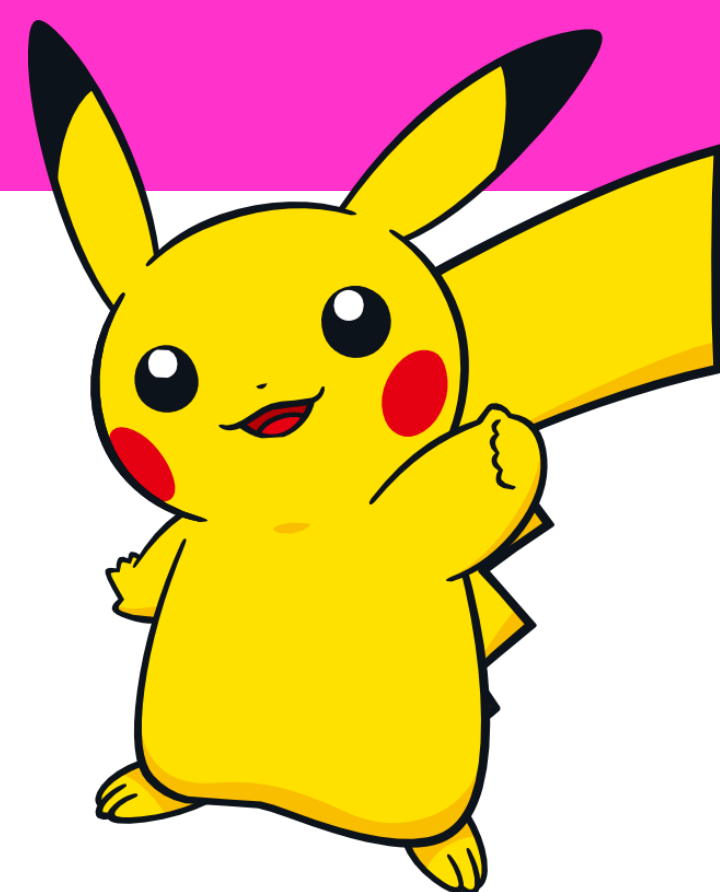
Background: Brexit

- A **major challenge** is to ensure that “Britain [is] able to agree a long-term economic relationship with the rest of Europe that provide[s] for the best possible terms of **trade in goods and services**” (Statement by the Chancellor of the Exchequer, George Osborne)




...only if the Parliament, the Government and the Judiciary cooperate in **clarifying the relationship** with the EU and in **ensuring the necessary**




Hot IP issues



I. NO (real) POSSIBILITY FOR INTERVENTION Unitary patent

- European Patent Convention (Munich) 
- Unitary Patent & Unified Patent Court 
- Brexit **may delay** the process of coming into effect of the new system
- Revision of the Unitary Patent Convention?** A) To exclude the UK, B) To include it (but EU law primacy and role of the CJEU...): [a European \(non-EU\) Unitary Patent?](#)

II. NO NEED TO UPDATE: a) Trade Marks

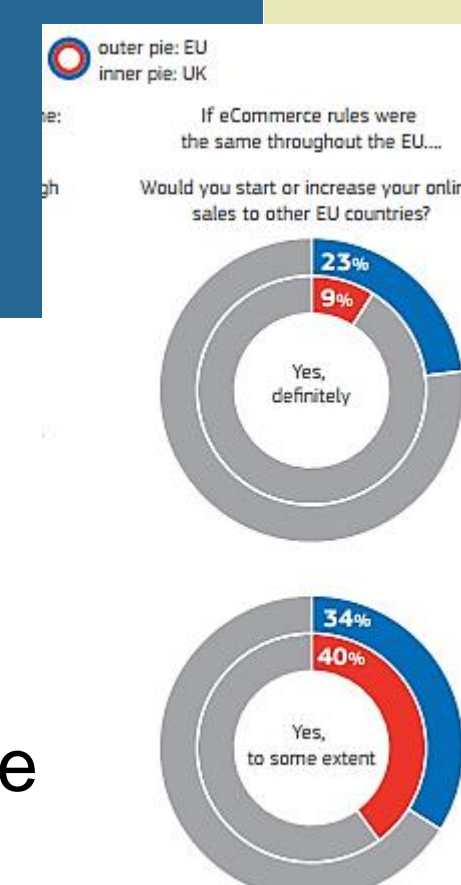
- EU Trade Marks** (and Registered Community Designs) 
- UK registrations in the Member States 
- TM **Harmonisation Directive** 2015/2436 
- BUT in line with the news (**procedural aspects and no** graphic representation)
- TM definition **not really new** (Sieckmann criteria recalled + new technical exclusion)

b) Trade secrets

Trade Secrets Directive **in line** with breach of confidence+contract law 

III. IN NEED OF AN UPDATE Geo-blocking

- Draft regulation on geo-blocking 
- It's in the **interest of the UK consumers** to ban geo-blocking of online services and ensure portability (e.g. Spotify)



EEA: a solution?

- Existing laws implementing EU © law will still apply (directives)
- No preliminary reference to the ECJ: UK judges will become European!
- EEA → 4 freedoms → **Digital Single Market, geo-blocking, and portability** (not in Annex XVII but related to trade and consumer protection)

OPPORTUNITY: IP REGIMES SHOPPING

- The UK could now **pick and choose** the rules which are fittest for the digital environment and better strike a balance between the interests of all the stakeholders



- From fair dealing** (EU/UK) **to fair use** (US)

4 TAKEAWAYS

1) Brexit will lead to a **prominent role of the judiciary** in ensuring that the UK will retain its position at the forefront of the protection of innovation

2) **Some IP areas need to be updated** (especially geo-blocking), but some others do not (trade marks)

3) The UK should leverage Brexit to do some “**IP regimes shopping**”

4) If the UK remains in the EEA, i) **the UK judges will become more...European**, because they will have to apply EU law without the power to refer to the CJEU for a preliminary ruling, ii) **Trade-related IP policies + Annex XVII** will remain European